No. 02-571

(5)

In the Supreme Court of the United States

EBONY PATTERSON, ET AL.,

PETITIONERS,

V.

JENNIFER GRATZ AND PATRICK HAMACHER,
AND
LEE BOLLINGER, JAMES J. DUDERSTADT, THE
BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

RESPONDENTS.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

RESPONDENTS GRATZ AND HAMACHER'S OPPOSITION TO THE MOTION TO ADVANCE

Michael E. Rosman
Hans Bader
CENTER FOR INDIVIDUAL RIGHTS
Suite 300
1233 20th Street N.W.
Washington, D. C. 20036
(202) 833-8400

Kerry L. Morgan
PENTIUK, COUVREUR &
KOBILJAK, P.C.
Suite 230, Superior Place
20300 Superior Street
Taylor, Michigan 48180
(734) 374-8930

David F. Herr
Counsel of Record
Kirk O. Kolbo
R. Lawrence Purdy
Michael C. McCarthy
Kai H. Richter
MASLON EDELMAN BORMAN &
BRAND, LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-4140
(612) 672-8200

6 pp

Respondents Gratz and Hamacher oppose petitioners' motion to advance (shorten) the time to respond to their petition for certiorari (the "*Patterson* petition"). Gratz and Hamacher are the petitioners in No. 02-516, now pending before the Court (the "*Gratz* petition"); they intend to file a response to the *Patterson* petition, but those petitioners have not provided sufficient reasons to justify shortening the time within which to respond.

Gratz and Hamacher agree that this *case* presents issues of fundamental national importance on which the lower courts are sharply divided. As they have already argued in their own petition, Gratz and Hamacher also believe that due to the nature of the constitutional and civil rights issues involved and the time-sensitive nature of the admissions process, it is appropriate and important for the Court to review the district court's judgment pursuant to Supreme Court Rule 11, which allows review before judgment in the courts of appeals. Gratz and Hamacher and the class that they represent believe that it is important for the Court to decide the issues raised in their petition during the current term of the Court, which might not otherwise occur, depending on when the Sixth Circuit finally issues a decision in the case.

Petitioners here were intervenors in the District Court. The *Patterson* petition was filed about two weeks after the *Gratz* petition. Both petitions arise out of the same case in the United States District Court for the Eastern District of Michigan relating to the racial preferences in admission of the flagship undergraduate college of the University of Michigan, the College of Literature, Science & the Arts. Under the Court's rules and the docket entry of the Gratz

petitioners' lodging, dated October 3, 2002, respondents have until November 2, 2002 within which to file a response to the *Gratz* petition.[1] Under the same rule, respondents to the *Patterson* petition have 30 days from the date on which the case was placed on the docket, *viz.*, October 16, 2002, to file a response. Sup. Ct. Rule 15.3. Thus, briefs in opposition currently are due on or before November 15, 2002. Contemporaneously with the filing of the *Patterson* petition, however, intervenors filed a motion seeking to advance the time for filing of a response. Specifically, the Patterson petitioners seek an order making responses to their petition due on the same date that responses are due to the earlier-filed *Gratz* petition. The stated reason for the motion to advance is to put the *Gratz* and *Patterson* petitions and the petition in *Grutter v. Bollinger* (No. 02-241) (the "*Grutter* petition"), relating to the racial preferences in admissions of the University of Michigan Law School, on the same schedule for review.

The reasons that justify granting of a Rule 11 petition for certiorari, however, do not justify shortening the time to respond to the *Patterson* petition. First, as Gratz and Hamacher will argue in their response, the *Patterson* petition is at best superfluous.[2] The issues that the Patterson petitioners seek to address

---

[1] Because November 2, 2002, falls on a Saturday, the due date for filing a response to the Gratz petition is actually Monday, November 4, 2002.

[2] It deserves mention that, although 28 U.S.C. § 1254 permits any party to seek a writ of certiorari, this Court's precedents would have prevented the Patterson petitioners from filing a cross-petition to the *Gratz* petition. The Patterson petitioners were successful on the only claim in which they possibly could have an interest, *viz.*, plaintiffs' claim for injunctive relief, and complain

(continued...)

through their petition can be raised in response to the *Gratz* petition. This is so because, as respondents to the *Gratz* petition, the Patterson petitioners are entitled to argue their distinct "remedial" justifications for affirming the district court's order denying plaintiffs' request for an injunction. *See, e.g.*, *Brown v. Allen*, 344 U.S. 443, 459 (1953) ("'In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.'" *quoting Helvering v. Gowran*, 302 U.S. 238, 245 (1937)).

Even if there were an independent basis for granting the *Patterson* petition, there is no imperative reason for shortening the time to respond to it. The premise of the motion to advance is that the *Gratz*, *Grutter*, and *Patterson* petitions should all be considered together at the same conference. There is no reason, however, to crimp the briefing schedule on one petition, so that they can all be considered at one conference. That is so particularly with respect to the *Grutter* petition, on the one hand, and the *Gratz* and *Patterson* petitions on the other, because they arise from judgments and orders entered by two different district courts. In any event, if the Court believes that all the petitions should be heard at the same conference, it is obviously capable of considering the *Patterson* petition with less than the full amount of time normally allotted.

---

[2] (...continued)
only that their particular argument for denial of that injunction was rejected. *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 365 & n.8 (1994) (successful party could not file cross-petition, although they could argue for affirmance on any ground raised in the court below).

Respondents Gratz and Hamacher intend to proceed diligently in preparing a response to the *Patterson* petition, and may manage to file their brief before the current November 15 deadline.[3] But Gratz and Hamacher respectfully submit that they should not be given substantially less time to respond to the *Patterson* petition than Patterson and the University have had to respond to the *Gratz* petition.

CONCLUSION

For the foregoing reasons, Respondents Gratz and Hamacher submit that Petitioners' motion to advance should be denied.

---

[3] The University respondents have proposed a response date of November 1, 2002, even earlier than the one proposed by the Patterson petitioners. If it had been made in a motion, Gratz and Hamacher would have opposed that suggestion for the same reasons that they oppose the Patterson motion for advancing the due date.

Respectfully submitted,

By David F. Herr (mes)

David F. Herr
Counsel of Record
Kirk O. Kolbo
R. Lawrence Purdy
Michael C. McCarthy
Kai H. Richter
Maslon Edelman Borman & Brand, LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-4140
(612) 672-8200

Michael E. Rosman
Hans Bader
CENTER FOR INDIVIDUAL RIGHTS
Suite 300
1233 20th Street N.W.
Washington, D. C. 20036
(202) 833-8400

Kerry L. Morgan
PENTIUK, COUVREUR & KOBILJAK, P.C.
Suite 230, Superior Place
20300 Superior Street
Taylor, Michigan 48180
(734) 374-8930